SOME SUGGESTIONS CONCERNING "LEGAL CAUSE" AT COMMON LAW. II.[1]

DIFFICULTY OF GENERALIZING THE LAW OF "LEGAL CAUSE" INTO DEFINITIVE RULES.

How do Courts determine the purposes of duties? By the same method which they use to determine their concrete content. Indeed the problem of "legal cause" may be described properly as one of further definition of duty.[2] Here again, what should be in the light of all juridical considerations applicable, is the question.[3]

I have mentioned and reiterated that duties always are concrete, because remembrance of the fact is essential to an understanding of "legal cause," and forgetfulness may recur as a chronic result

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The limitations of space for an ordinary contribution to a legal periodical and the breadth and complexity of the topic of "legal cause" prohibit adequate detailed exposition in this form. I offer only some general ideas concerning the nature and scope of the problem presented, which I have evolved from my study of cases and found helpful. My purpose is suggestion and not detailed exposition; and therefore I barely have sketched what I judged a sufficient indication of my ideas, leaving to the skill and patience of the reader the critical development and examination of details prerequisite to intelligent acceptance or rejection.

[2]In this connection consider in addition to the cases discussed in this article the following:—

Smethurst *v.* Proprietors Ind. Cong. Church (Mass. 1889) 19 N. E. 387; Township of Plymouth *v.* Graver (Pa. 1889) 17 Atl. 249; Campbell *v.* Stillwater (1884) 32 Minn. 308, 50 Am. R. 567; Firth *v.*, Bowling Iron Co. (1878) L. R. 3 C. P. D. 254; Randall *v.* Hazelton (Mass. 1866) 12 Allen 412; Klous *v.* Hennessey et al. (1881) 13 R. I. 332; Gibney *v.* State (1893) 137 N. Y. 1; Knapp *v.* Sioux City etc. Ry. Co. (1884) 65 Ia. 91; Hoard *v.* Peck (N. Y. 1867) 56 Barb. 202; Renner *v.* Canfield (1886) 36 Minn. 90, 30 N. W. 435, 1 Am. St. R. 645.

[3]As a Court frequently finds it difficult to determine questions concerning the existence and content of duties, so difficulty often is encountered in delimiting the particular scope of a duty. In both classes of questions there sometimes is room for reasonable differences of judgment. Therefore we should not be perplexed to find some conflict in decisions on cases presenting similar sets of facts. The difficulty is not to apply correctly a rule or principle of law (as is sometimes imagined), but to determine what should be the result of a conflict of various juridical considerations.

The opinions of the judges explaining an adjudication of the existence of a duty may contain no expression of its purposes. Enough may be indicated by the content of the duty; or precedent may be deemed a sufficient justification. Furthermore, it never is necessary to define purposes beyond the demands of the concrete case before the Court; and so an opinion seldom, and never authoritatively, discloses more than a fragmentary description of scope. As in ascertaining the content of duties, so in ascertaining their scope, we have no safe guides but authoritative concrete adjudications and comprehension of all the particular considerations bearing on the problem.

of superstition either that law necessarily consists of generalities; or that it must, to be scientific. Now I wish to call to attention that the purposes of a duty also are concrete;[4] and that as the concrete content of different duties of the same species varies, so also the purposes vary. All duties not to trespass wrongfully on land answer the immediate purpose of protecting the exclusiveness of possession; but beyond this common object, a concrete situation may afford one or more peculiar purposes to the duty not to commit a certain trespass.[5] So duties not to commit a wrongful battery on the person have the common immediate end of preventing the annoyance of unpermitted physical contact; but in a particular case there may be other legal purposes subserved by the imposition of the duty, depending on the physical condition of the obligee; circumstances of time and place; the characteristics of the contact in question; possible future casualties partly caused by effects of the contact, and various other potential co-operating causes of contingent damage.[6] In the chaotic field of "negligence," the possibil-

[4]Though of course it is impracticable to define extensively the purposes of any given duty otherwise than by abstract specifications.

When we say that X is careless in driving down the street in a certain reckless manner, we apply the epithet to his conduct because we know that it threatens damage to himself and others. We do not not stop to analyze into infinitude all the possible damaging contingencies that may ensue which constitute this abstract danger. Generally we even do not stop to consider that there are possibilities of consequential damage which fall without the danger evoking the censure. Our knowledge that this reckless driving is "dangerous" is enough to condemn it. But when damage has occurred as a consequence of the conduct. there may arise the question:—Was the driver to blame for this? To answer intelligently, it becomes necessary to analyze a little that formless "danger" which provoked our condemnation, in order that we may determine whether or no this contingency formed part of it; and no matter how long the sequence of harm upon harm,—with respect to each link the question of blame will depend upon the same sort of analysis. Our discussion concerns a legal problem similar to this moral one; and Courts face constantly a similar necessity for further analysis and definition. Consider, for instance:—Page *v.* Bucksport (1874) 64 Me. 51; Weiting *v.* Millston (Wis. 1890) 46 N. W. 879; Vosburg *v.* Putney (1891) 80 Wis. 523; Scheffer *v.* R. Co. (1881) 105 U. S. 249; Bishop *v.* St. Paul City Ry. Co. (Minn. 1892) 50 N. W. 927; Gibney *v.* State (1893) 137 N. Y. 1; Gilman *v.* Noyes (1876) 57 N. H. 627; Sledge *v.* Reid (1875) 73 N. C. 440.

[5]See Ellis *v.* Loftus Iron Co. (1874) L. R. 10 C. P. 10; Lee *v.* Riley (1865) 18 C. B. (N. S.) 721; Guille *v.* Swan (N. Y. 1822) 19 Johns. 381; Vandenburgh *v.* Truax (N. Y. 1847) 4 Den. 464; Keenan *v.* Cavanaugh (1872) 44 Vt. 268.

[6]See Vosburg *v.* Putney (Wis. 1893) 56 N. W. 480; Vosburg *v.* Putney (1891) 80 Wis. 523; Ricker *v.* Freeman (1870) 50 N. H. 420, 9 Am. R. 267. Also see Lawrence *v.* Jenkins (1873) L. R. 8 Q. B. 274; Hill *v.* New River Co. (1868) 9 B. & S. 303, 18 L. T. (N. S.) 355; Hunt *v.* Lowell Gas Light Co. (Mass. 1864) 8 Allen 169; Kuhn et al. *v.* Jewett (1880) 32 N. J. Eq. 647; Smith *v.* Green (1875) L. R. 1 C. P. D. 92.

ity of variety in peculiar purposes is particularly evident, but it exists in that of even the narrowest class of wrongs.

What is the applicability of this? Comprehension of what I barely have indicated will disclose the difficulty of formulating adequate rules concerning "legal cause." To be dependable, a rule must indicate accurately the concrete decisions which it generalizes. The alternative damaging sequences which may result from a postulated concrete wrong are so numerous, and so complex with various potential contributing causes, that often comprehensive classification into "proximate" and "remote" can be indicated only by broad specifications. If duties are grouped into classes, the specifications of scope for each class necessarily are broader and less definite than those for the individual variant duties falling in the class. The wider the class, the more pronounced is the effect of this tendency. Therefore it should be evident that if we attempt to lay down a set of rules which will indicate the particular scope of *any* concrete duty, these rules must be either numerous and each narrowly limited, or very indefinite and unsatisfactory guides.

Brief Analyzation of Current "Rules." Criticism: They Are Vague and Misleading.

When judges feel impelled to generalize concerning "legal cause," the precepts which commonly result state that a wrongdoer is liable only for "ordinary consequences;" or "natural consequences;" or "probable consequences;" or "proximate consequences;" or "those consequences which follow in ordinary unbroken sequence;" or "those consequences which follow without the intervention of an independent cause;" or "those consequences which a man of ordinary prudence would have foreseen as likely to occur;" or "those consequences which defendant ought to have foreseen;" or those consequences which possess two or more of the foregoing qualities in combination. Each of these phrases is used with such varying and indefinite, and sometimes ill-considered, meaning, that analyzation of typical instances of use would not produce anything commensurate with the labor. Therefore let us search out the most satisfactory significance which we fairly can attach to each, and test the results in the light of our knowledge of how Courts dispose of concrete questions of "legal cause." [7]

[7] In examining these "rules" let us bear in mind constantly that the legitimate purpose of formulation is not to deduce precepts *a priori* by abstract reasoning; but to evolve precepts tested and justified by what the Courts would decide in concrete cases. One case nor several cases can ever make

"Ordinary" must have a broader meaning than "usual," since a wrongdoer frequently is held responsible for consequences which cannot be called "usual" with accuracy. For instance, a blow on the head of a passenger, resulting after a considerable interval in paralysis of the passenger through bursting of a degenerate blood-vessel, is not a usual, though it is an ordinary sequence of wrongfully letting a cable-car run away down-hill.[8] "Not surprising in the light of average human experience" approximates the proper definition. But even with this broader significance, the term will require stretching if it is to cover all consequences for which wrongdoers will be responsible.[9]

"Natural" is used synonymously with "ordinary" and is subject to the same commentary.

"Probable," as used in this connection, is a word of very indefinite import. Its range does not end where the chances of occurrence and non-occurrence are equal, but merges intangibly into the merely possible. Furthermore, "probable" consequences include not only those concrete contingencies that are likely to hap-

a rule. Only when we know that it will stand scrutiny in the light of all particular problems within its field, can we use it with intelligent confidence as an intellectual tool, although it may have been stated and reiterated in opinions of judges times without number.

In criticising generalizations stated in judicial opinions, we must distinguish those which are intended for limited application. For instance, the criterion settled upon in Gilman *v.* Noyes (1876) 57 N. H. 627 (see p. 32, *supra*) was one evolved for the purposes of that case and should not be criticised in any other light. So in different jurisdictions, different limitations on responsibility for negligently causing fires have been set, which should not be generalized into universal "rules" of proximate cause, and then criticised for inconsistency with criteria used in other sorts of cases in the same jurisdiction. From the cases, Ryan *v.* R. Co. (1886) 35 N. Y. 210; Webb *v.* R. Co. (1890) 49 N. Y. 420; Frace *v.* R. Co. (1894) 143 N. Y. 182; Hoffman *v.* King et al. (1891) 160 N. Y. 618, we may gather that in New York the duty not to cause a certain concrete spreading of fire is owed with respect to that property only which is immediately imperiled by the negligent acts or omissions. Diversity in ownership is an immaterial consideration; so also is distance, except in so far as it throws light on the question of peril. We reasonably may disagree with these decisions, preferring those of Atkinson et al. *v.* Goodrich Co. (1884) 60 Wis. 141, 18 N. W. 764, or of Poeppers *v.* Ry. Co. (1878) 67 Mo. 715, but they have in their favor the peculiar juridical considerations of policy mentioned by Hunt, *J.*, in Ryan *v.* R. Co. (1886) 35 N. Y. 210, at 216-217, which should have secured them from the unmitigated censure which they have received from some quarters. Cf. Winterbottom *v.* Wright (1842) 10 M. & W. 109. Certainly it is not sound legal argument to insist upon ignoring these practical considerations in favor of academic uniformity in "rules" for all cases of "legal cause."

[8]Bishop *v.* St. Paul City Ry. Co. (Minn. 1892) 50 N. W. 927.

[9]Consider Vosburg *v.* Putney (1891) 80 Wis. 528; Vosburg *v.* Putney (Wis. 1893) 56 N. W. 480; Baltimore City Pass. Ry. Co. *v.* Kemp (1883) 61 Md. 74; Keenan *v.* Cavanaugh (1872) 44 Vt. 268; Hill *v.* Winsor (1875) 118 Mass. 251.

pen, but also those not individually "probable," but belonging to a sort of which one or another, in the alternative, may be expected. For instance, when reckless driving by a common carrier endangers his passengers, many of the imaginable concrete contingencies through which a certain passenger may be hurt seem very improbable—perhaps any particular sequence might be deemed not "probable" in view of the many alternatives;— but it is "probable" that some one of these many sequences will occur, and for any of those which constitute the danger inducing the legal condemnation of the carrier's conduct, he is responsible. Still we shall be puzzled to stamp "probable" all consequences not "too remote," without warping our judgment.[10]

[10]See Lawrence *v.* Jenkins (1873) L. R. 8 Q. B. 274; Keenan *v.* Cavanaugh (1872) 44 Vt. 268; Weiting *v.* Millston (Wis. 1890) 46 N. W. 879 [cf. Lincoln *v.* R. Co. (N. Y. 1840) 23 Wend. 425]; Elder *v.* Lykens Valley Coal Co. (1893) 157 Pa. St. 490, 27 Atl. 545; Hill *v.* Winsor (1875) 118 Mass. 251; Bishop *v.* Ry. Co. (Minn. 1892) 50 N. W. 927; Baltimore City Pass. Ry. Co. *v.* Kemp (1883) 61 Md. 74; Vosburg *v.* Putney (1891) 80 Wis. 523; Tice *v.* Munn (1883) 94 N. Y. 621; Page *v.* Bucksport (1874) 64 Me. 51, 18 Am. R. 239; Eten *v.* Luyster (1875) 60 N. Y. 252; Ga. etc. Co. *v.* McAllister (1906) 126 Ga. 447, 54 S. E. 957, 7 L. R. A. (N. S.) 1177.

Cf. Haley *v.* St. Louis Transit Co. (1903) 179 Mo. 30, 77 S. W. 731, 64 L. R. A. 295; Lewis *v.* R. Co. (1884) 54 Mich. 55, 52 Am. R. 790, 19 N. W. 744; Conway *v.* Lewiston etc. R. Co. (1897) 99 Me. 199, 38 Atl. 110; Sledge *v.* Reid (1875) 73 N. C. 440 [cf. Smith *v.* Goodman et al. (1885) 75 Ga. 198; McAfee *v.* Crofford (U. S. 1851) 13 How. 447]; Dubuque Ass'n *v.* Dubuque (1870) 30 Ia. 176. (Are we not to gather that the Court deemed plaintiff's delay too remote a consequence because removal of the wood by water might have been effected at plaintiff's option? The petition does not negative sufficiently the possibility of removal by river. This interpretation makes the decision comprehensible. It is difficult to justify otherwise. Cf. Pittsburgh *v.* Grier (1853) 22 Pa. St. 54); Scheffer *v.* R. Co. (1881) 105 U. S. 249 (Doesn't this case belong under the subsidiary principle that an injured person should not be permitted voluntarily to increase the liability of a wrongdoer?)

But see Pullman Palace Car Co. *v.* Barker (1878) 4 Colo. 344, 34 Am. 89. (This case has been criticised. The Court was misled by cases to the effect that a carrier is not obliged to adjust its conduct to suit a passenger's peculiar condition of which it is not aware.). South Side Pass. Ry. Co. *v.* Trich (1887) 117 Pa. St. 390, 2 Am. St. R. 672. (If it was legitimate to assume from examination of the record that plaintiff had recovered control of herself before the team came upon her, the decision was justifiable, for certainly it was not among the ends of the infringed duty to protect from concrete dangers incident to mere presence in the street. If, however, the correct assumption was that plaintiff was struck so soon after her fall that escape would have been impossible even if the danger had been seen, I think we would agree that the decision was unjust. The opinion mentions the exceptional character of the peril as an important consideration. Undoubtedly some exceptional consequential contingencies were beyond the scope of the duty. For instance, if plaintiff had been thrown over a man-hole and an explosion had blown off the lid at the moment of her fall; or if a brick had dropped unseen from the top of a building in the process of erection and hit the plaintiff on the head as she lay on the ground; defendant would not have been responsible for the conse-

A little further commentary applicable to both "probable" and "ordinary" may be of use. In applying these rules, I suppose, one is to imagine himself observing the wrong at the time of commission and stamp any suggested consequence "probable" or "ordinary" from that viewpoint. It is obvious that the stamping will depend not only on the sagacity of the person passing judgment, but also on his knowledge of the existence of pertinent causal facts. The greater our knowledge of such facts, the narrower may be the field of uncertainty concerning future consequences and the fewer the chances of surprise over the events. For instance, an observer of the wrongful act involved in *Vosburg* v. *Putney*[11] who was aware of the presence of the germs in plaintiff's leg and of their properties, would have labeled "probable" and "ordinary" the sequences that produced plaintiff's damage; but to an observer without this knowledge, such sequences would have seemed improbable prospectively, and extraordinary when they occurred. What knowledge of pertinent causal facts are we to assume as a basis for our judgment in applying these rules? This will be found a very difficult matter to define. Perhaps an acceptable answer is: As much as observation of the occurrences and patent circumstances which constituted and colored the wrong would disclose to a well-informed man, plus any such knowledge which the wrongdoer himself had. Of course to include the results involved in *Vosburg* v. *Putney*[11] among "probable consequences" or "ordinary consequences" from the viewpoint indicated by this definition would necessitate stretching "probable" until it would differ imperceptibly from "possible," and "ordinary" until it would mean merely "not astounding."

"Consequences which a man of ordinary prudence would have foreseen as likely to occur" often is used synonymously with "probable consequences." Sometimes, however, it apparently indicates that a defendant is responsible only for such consequences as he might have anticipated if he had been reasonably attentive and intelligent. What "a man of ordinary prudence" in the situation of the wrongdoer at the time of his wrongful act or omission would

quential damage to plaintiff. But these would have been events against which plaintiff could have adopted no measures of avoidance if she had been on her feet and self-possessed. A runaway horse is a peril against which control over one's movements and attention will be of value. Surely the duty not to throw plaintiff defenseless in the street by negligence should have been imposed for the purpose of preventing damage from the particular perils of the street, whether exceptional or not, to which plaintiff's loss of defensive ability exposed her.)

[11](1891) 80 Wis. 523.

have foreseen, is an important matter whenever the existence or the extent of a duty to take care is to be determined; and in particular suits it may be decisive of responsibility for consequences.[12] But it does not give the limits of responsibility for all wrongs; nor even for all negligent wrongs.[13]

"Those consequences which defendant ought to have foreseen" generally is convertible into "those consequences which it was his duty to prevent." Obviously we are carried nowhere by this.

Why is it said that a "legal consequence" must be "ordinary" or "probable" in the very elastic sence peculiar to this connection? Because to place the prevention of a specific sort of undesirable consequences within the purposes of a duty, the chances of the occurrence of one or another of the sort must be great enough to induce legal condemnation of a breach of the duty in its aspect as a cause of them. But the degree of "probability" necessary to provoke this condemnation may vary with the magnitude of the contingent harm;[14] or with the character and circumstances of the wrongful act or omission.[15] Furthermore, other considerations than "probability" of consequential harm or annoyance often are important in a determination of either the existence or the purposes of a duty. Very frequently whether defendant had a reasonable opportunity to apprehend the threatening contingencies is a controlling question.[16] Sometimes the fact that the wrongful act or

[12]See, for instance, Gilman *v.* Noyes (1876) 57 N. H. 627.

[13]See Vosburg *v.* Putney (1891) 80 Wis. 523; Ehrgott *v.* The Mayor (1884) 96 N. Y. 264; Weiting *v.* Millston (Wis. 1890) 46 N. W. 879; Keenan *v.* Cavanaugh (1872) 44 Vt. 26.

The concrete content of a duty to use the care "of a man of ordinary prudence" depends upon what dangers "ordinary prudence" would anticipate under the circumstances; and it may be advanced as a safe hypothesis that the prevention of a contingency which does not occur through fruition of some of those dangers, is beyond the purposes of the duty. But the specific proximate consequence that occurs may be surprising to prudence. See Hill *v.* Winsor (1875) 118 Mass. 251; Bishop *v.* St. Paul City Ry. Co. (Minn. 1892) 50 N. W. 927; Baltimore City Pass. Ry. Co. *v.* Kemp (1883) 61 Md. 74; Page *v.* Bucksport (1874) 64 Me. 51, 18 Am. R. 239; Smith *v.* L. & S. W. Ry. Co. (1870) L. R. 5 C. P. 98, (1870) L. R. 6 C. P. 14; Dulieu *v.* White et al., L. R. [1901] 2 K. B. 669; and note 4, *supra.* But see Pullman Palace Car Co. *v.* Barker (1878) 4 Colo. 344; Hoag *v.* Lake Shore etc. R. Co. (1877) 85 Pa. St. 293.

[14]Holmes' Common Law, pp. 154-157.

[15]Cf. Vosburg *v.* Putney (1891) 80 Wis. 523; Weiting *v.* Millston (Wis. 1890) 46 N. W. 879; Keenan *v.* Cavanaugh (1872) 44 Vt. 26; Willy *v.* Mulledy (1879) 78 N. Y. 310, 34 Am. R. 536; Harrison *v.* Berkley (S. C. 1847) 1 Strobh. L. R. 525; Cobb *v.* Ry. Co., L. R. [1893] 1 Q. B. D. 459; Snyder *v.* Ry. Co. (1906) 36 Colo. 288, 8 L. R. A. (N. S.) 781.

[16]See Note 13, and Note 40, p. 36, *supra;* Sedg. Damages § § 144-169.

omission did not increase the specific danger prevents or aids in preventing responsibility for it.[17] Often the fact that plaintiff had reasonable opportunity to avoid the particular consequence of which complaint is made tends to absolve defendant from legal blame for its occurrence.[18] In particular cases it seems not unjust that defendant should not be responsible for specific consequences to which a certain wrong of a third person has contributed, even though that wrong and its particular effects were "probable" results of defendant's wrong.[19] Doubtless other considerations of like counteracting tendency might be abstracted from decided cases;[20] but these will suffice to explain why judges often have thought it necessary to restrict further their "rules" of "legal cause" by adding to the statement that "legal consequences" must be "ordinary" or "probable," either that they must be "proximate;" or that they must "follow in ordinary unbroken sequence;" or that they must "follow without the intervention of an independent cause."

What is meant by "without the intervention of an independent cause?" All causes which are not in a particular sequence, though they contribute to one or more consequences in the sequence, logically may be termed independent causes with respect to any in the sequence preceding the "point of contribution or intervention." [21] It is not true, however, that the intervention of *any* such cause will determine responsibility. Frequently even the intervention of a cause for which a third person is legally responsible

[17]Consider: Lewis *v.* Ry. Co. (1884) 54 Mich. 55, 52 Am. R. 790, 19 N. W. 744; Haley *v.* St. Louis Transit Co. (1903) 179 Mo. 30, 77 S. W. 176; Ga. etc. Co. *v.* McAllister (1906) 126 Ga. 447, 54 S. E. 957, 7 L. R. A. (N. S.) 1177.

[18]Consider: Sledge *v.* Reid (1875) 73 N. C. 440; Smith *v.* Goodman et al. (1885) 75 Ga. 198; Dubuque Ass'n *v.* Dubuque (1870) 30 Ia. 176; Haley *v.* St. Louis Transit Co. (1903) 179 Mo. 30, 77 S. W. 176; Loker *v.* Damon (Mass. 1835) 17 Pick. 284; Plummer *v.* Lumbering Ass'n (1877) 67 Me. 363.

[19]Consider: Scholes *v.* Ry. Co. (Nisi Prius 1870) 21 L. T. R. (N. S.) 835, (see note 22, p. 31, *supra*); Alexander *v.* Town of Newcastle (1888) 115 Ind. 51; Carter *v.* Towne (1870) 103 Mass. 507.

[20]Spade *v.* R. Co. (1897) 168 Mass. 285; Ryan *v.* R. Co. (1866) 35 N. Y. 210.

[21]To illustrate:— In Denny *v.* R. Co. (Mass. 1859) 13 Gray 481, the flood overflowing the banks of the river was an independent cause with respect to the delay by defendant; in Vosburg *v.* Putney (1891) 80 Wis. 523, the presence of the germs in plaintiff's leg was an independent cause with respect to defendant's blow, and the harmful action of the germs was a cause dependent on both these other two; in Clark *v.* Chambers (1878) L. R. 3 Q. B. D. 327, the advent of the stranger was a cause independent of defendant's act of placing the hurdle across the road and the presence of the hurdle across the footpath was a dependent cause both with respect to defendant's acts and with respect to those of the stranger.

does not put an end to defendant's responsibility; nor does necessarily the contribution of an act or omission which is intentional and "legally blamable" for the result.[22] Will the contribution of an unforeseeable "legally blamable" cause render consequences of defendant's wrongful conduct too remote? If we mean by unforeseeable not "ordinary" or not "probable," we can answer "Yes;" but this interpretation would make useless the addition of the requirement to that of "probability;" for if a consequence is "probable," it has occurred without any "improbable" interventions. Canvass the possibilities of the phrase "consequences occurring without the intervention of an independent cause" as we may, we shall find no satisfactory definitive meaning for our purposes except "consequences occurring through only such interventions as leave defendant legally blamable for them," and of course, this brings us around the circle. A like result will be obtained from analysis of the other two restrictive phrases.[23]

What do we net from these "rules?" Anything beyond an indication that in order to be proximate, a consequence must be of

[22]Compare, for instance, Denny *v.* R. Co. (Mass. 1859) 13 Gray 481, 74 Am. Dec. 645; Fox *v.* R. Co. (1889) 148 Mass. 220; Dubuque etc. Ass'n *v.* Dubuque (1870) 30 Ia. 176; Pittsburgh *v.* Grier (1853) 22 Pa. St. 54; Willy *v.* Mulledy (1879) 78 N. Y. 310, 34 Am. R. 536; Weiting *v.* Millston (Wis. 1890) 46 N. W. 879; Vosburg *v.* Putney (1891) 80 Wis. 523; Scheffer *v.* R. Co. (1881) 105 U. S. 249; Page *v.* Bucksport (1874) 64 Me. 51, 18 Am. R. 239; Gibney *v.* State (1893) 137 N. Y. 1; Gilman *v.* Noyes (1876) 57 N. H. 627; Nelson *v.* Ry. Co. (1882) 30 Minn. 74; Burrows *v.* Gas Co. (1872) L. R. 7 Ex. 96; Guille *v.* Swan (N. Y. 1822) 19 Johns. 381.

[23]"Proximate cause" of course does not mean the nearest cause. It and the phrases *"causa causans,"* "predominating cause," and "efficient cause"—(What among many essential causes can be said to predominate or be exclusively efficient?)—cannot be resolved into anything more satisfactory than "legally blamable cause"—that is, a cause to which the Courts will charge responsibility for the consequence in question. The distinction sometimes suggested between a "condition" and a "cause" will be found upon analysis to be the same as that between "blamable" and not "blamable" causes, and therefore is of no value. Furthermore, since a "blamable" cause may be a wrongful omission to change a condition, this peculiar use of the word "condition" sometimes necessitates an antithesis of "conditions" and passivity or its static consequences which tends only to confuse.

Perhaps sometimes the phrase "probable and proximate consequences" is used with the meaning that a wrongdoer is responsible not only for "probable" consequences, but *also* for such as are "proximate." The use renders the phrase not sufficiently exclusive. Sometimes "proximate" used in combination with "probable" or "ordinary" is interchangeable with "direct," another vague word. "Direct" consequences perhaps are those which follow an act or omission in such sequence that to unreasoning intelligence they appear to be produced by it alone. As I have indicated already, "proximate consequences" is used sometimes as a sufficient definitive phrase by itself. Then the "definition" is only a veil covering the problem—an expression of it in obscure language.

a "sort" not too contingent; but that it may be too remote, though it is "probable?" Even if some better interpretation of them can be found, they, or any other universal precepts which might be formulated, would be indefinite and unsatisfactory guides. Furthermore, ready-made generalizations, however good, cannot take the place of thorough analysis and independent judgment with a lawyer. If he trusts to abstractions alone, he runs the chance of being carried far astray. Such rules as those which we have been considering distract the attention from the essence of the problem and give nothing tangible in return.

Analyzation of Second Branch of Our Problem and Summary of Cases Thereon.

Let us examine the second branch of our investigation. How does it differ from the first branch? Concerning cases falling in the first, we have postulated a breach of an ascertained duty owed *plaintiff*, leaving to be settled only the particular scope of this duty in respect to the occurrences of which complaint is made. Cases falling in the second involve a previous inquiry, whether a duty owed plaintiff has been infringed. If this inquiry determines that plaintiff has been wronged by defendant, obviously the case falls into the first branch. Therefore our discussion now may be confined to the following query:

When do consequences of an act or omission of defendant which constituted a breach of a legal duty owed some third person, become a wrong to plaintiff?

This is an inquiry concerning the existence and content of duties, and not concerning their purposes. We have in our books a multitude of precepts of limited applicability more or less definitely indicating specific rights, and we may obtain in time a more systematic classification of wrongs which will facilitate a better articulation of indicatory rules; but so varying are the number, character, complexity, and individual potency of the juridical considerations relevant in different concrete situations that to evolve a few formulas which will delimit all duties under every combination of circumstances is impossible. Can we devise useful generalizations concerning the effect of the wrongfulness of defendant's act or omission as respects the rights of a third person, upon the determination of the content of his duty toward plaintiff in a situation to which consequences of the act or omission have contributed?

Scott v. *Shepherd.*[24]—At the trial of an action of trespass, a verdict was found for plaintiff subject to the opinion of the Court on the following case. Defendant threw a lighted squib made of gunpowder into a market-house, where it fell on the stand of one Yates. One Willis

"instantly, and to prevent injury to himself and the said wares of the said Yates, took up the said lighted squib from off the said standing and then threw it across the said market-house; where it fell upon another standing there of one Ryall, who sold the same sort of wares; who instantly, and to save his own goods from being injured, took up the said lighted squib from off the said standing, and then threw it to another part of the said market-house, and in so throwing it struck the plaintiff, then in the said market-house, in the face therewith, and the combustible matter, then bursting, put out one of the plaintiff's eyes."

The Court held by a vote of 3 to 1 that trespass was maintainable. It is to be observed that there were two distinct questions involved:—(1) whether the facts established an actionable wrong of defendant against plaintiff and (2) whether trespass was the proper form of action. The second question was the one to which most of the arguments of the judges were addressed. The first, which alone is of interest to us at present, was settled without apparent difficulty by the three assenting judges and was not answered at all by Blackstone, *J.*, though he expressed an inclination toward the view that defendant would have been liable in case. There was nothing extraordinary in the sequence which ended in the injury. Indeed, the acts and motives of Willis and Ryall were such as are usual in like situations.[25] Clearly the chances of occurrence of the damage belonged within the indefinite danger which provoked legal condemnation of defendant's act. Therefore, when

[24](1773) 2 W. Black. 892, 3 Wils. 403.

[25]It sometimes is supposed that the validity of the decision that defendant was responsible in some form of action, rests upon the assumption, made by De Grey, *C. J.*, and Gould, *J.*, that the contributing acts of Willis and Ryall were instinctive. See, for instance, Beven on Negligence (2nd. Ed.) 177. The two justices deemed this assumption necessary, not to justify holding defendant responsible, but to justify holding him in trespass. Why should not defendant have been responsible in case, even if Willis and Ryall acted negligently? Defendant created danger of such an occurrence. Cf. Burrows *v.* Gas Co. (1872) L. R. 7 Exch. 96. Indeed, probably the assumption that they were not in the wrong was not necessary to support the decision as to the form of action even. The suggestion of Nares, *J.*, that the burning squib, a force set in motion by defendant, directly caused the injury, seems a more satisfactory justification of the decision on this point.

through the ensuing events, plaintiff was put in peril from the squib, a breach of a duty owed plaintiff by defendant was consummated. The injury, being the fruition of this peril, of course was chargeable to defendant.[26]

Lowery v. *Manhattan Ry. Co.*[27]—Through negligence of defendant, coals of fire from an engine dropped upon a horse and the hand of its driver in the street below. The horse became frightened and ran away. The driver turned it towards the curbstone to check its progress; but the wagon passed over the curb, the driver was thrown out, and plaintiff, a traveler on the sidewalk, was run over and injured. It was held that defendant was responsible. Negligently causing the runaway undoubtedly was a wrong to the driver and to the owner of the horse and wagon. It was also an inchoate wrong in another aspect because it threatened danger to those who might come within reach of the runaway. Misjudgment on the part of the driver in his attempts to stop his horse, resulting in damage to a person on the sidewalk, was not such an extraordinary sequence that the possibility of it should have been excluded from the danger which made defendant's omission inchoately wrongful. To prevent danger of this damage, then, was a duty properly imposed on defendant.[28]

Clark v. *Chambers.*[29]—Defendant placed two hurdles and two *chevaux de frise* barriers across a private road. Somebody, without authority from defendant, removed one of the barriers and placed it upright across the footpath. Plaintiff, lawfully coming along the road at night, felt his way through the opening between the hurdles and stepped into the path. His eye came into collision with one of the spikes of the removed barrier and was forced out of its socket. Defendant's act was a wrongful trespass as respects the rights of the owner of the soil of the road; it was also a wrong as respects the rights of those possessing easements of passage, because it interfered with and endangered the use. But plaintiff was neither owner of the soil nor owner of the right of way. He was an invited guest of the owner of one of the dominant tenements. Therefore there arose the difficulty of showing breach of a duty owed plaintiff. However, defendant's act was

[26]Cf. Ricker *v.* Freeman (1870) 50 N. H. 420, 9 Am. R. 267; Thomas and Wife *v.* Winchester (1852) 6 N. Y. 397.

[27](1885) 99 N. Y. 158.

[28]See also McDonald *v.* Snelling (Mass. 1867) 14 Allen 290, 92 Am. Dec. 768; Phillips *v.* De Wald (Ga. 1887) 7 S. E. 151; Collins *v.* West Jersey Exp. Co. (1905) 72 N. J. L. 231, 62 Atl. 675, 5 L. R. A. (N. S.) 373.

[29](1878) L. R. 3 Q. B. D. 327, 47 L. J. Q. 427, 38 L. T. 454, 26 W. R. 613.

also inchoately wrongful in that it threatened danger to those who might use the way; and at least anyone lawfully using it, even though not in the exercise of a property right, could claim that defendant owed him a duty not to endanger his person in this manner. The complicating circumstance was the intervention of the third person's act, which was an important cause of the injury; for if the hurdle had been left in place, plaintiff, who knew of the obstruction of the road, perhaps would have escaped. A removal of one of the barriers by some traveler was a "probable" contingency, and even though that it would be left across the footpath was not probable (in the strictest sense of the word), there was cause for apprehension that the removal would be such as to increase rather than lessen the danger to users of the road. Therefore the Court placed the sequence ending in plaintiff's injury among the possibilities which contributed to constitute the danger that justified legal condemnation of defendant's conduct; and defendant was held liable for the damage.[30]

Willy v. *Mulledy*.[31]—Defendant, in violation of a statute, neglected to provide his building with fire escapes and ladders leading to scuttles in the roof. In consequence of this omission, the wife and the child of plaintiff, who had rented an apartment of defendant, lost their lives in a fire. Though the statute did not expressly create civil liability for a breach, the Court held that because of the statute, there existed civil duties to the wife and child which defendant had infringed and that, therefore,[32] plaintiff had his statutory remedy for damages for their deaths.

Queen v. *Dayton Coal & Iron Co.*[33]—In violation of a penal statute, defendant employed plaintiff, a boy of twelve years to work in its mine. Plaintiff was injured in the course of his work. The Court held that the jury should have been instructed that be-

[30]Cf. Parker *v.* City of Cohoes (1877) 10 Hun 531, aff'd, (1878) 74 N. Y. 610; Powell *v.* Deveney (Mass. 1849) 3 Cush. 300; Pastene *v.* Adams (1874) 49 Cal. 87; Henry *v.* Dennis (1883) 93 Ind. 452.

[31](1879) 78 N. Y. 310, 34 Am. R. 536.

[32]Cf. Harrison *v.* Berkley (S. C. 1847) 1 Stroh. L. R. 525; Carter *v.* Towne (1870) 103 Mass. 507; Binford *v.* Johnston (1882) 82 Ind. 426; Poland *v.* Earhart (1886) 70 Ia. 285, 30 N. W. 638; Clark *v.* R. Co. (1887) 64 N. H. 323; Couch *v.* Steel (1854) 3 El. & Bl. 402, 77 E C. L. 402; Atkinson *v.* Newcastle Waterworks Co. (1877) L. R. 2 Exch. D. 441; Salisbury *v.* Herchenroder (1871) 106 Mass. 458, 8 Am. R. 354 (This decision was justifiable only if the Court was convinced that the statute was passed to obviate such a contingency as occurred).

Compare with the foregoing cases, Welsh *v.* Geneva (1901) 110 Wis. 388; Steele *v.* Burkhardt (1870) 104 Mass. 59; Broschart *v.* Tuttle (1890) 59 Conn. 1; Sutton *v.* Wauwatosa (1871) 29 Wis. 21.

[33](1895) 95 Tenn. 458, 30 L. R. A. 82, 32 S. W. 460, 49 Am. St. R. 935.

cause of the statute, the employment of plaintiff was negligence as respects his rights.[34]

Sharp v. *Powell.*[35]—Defendant's servant washed a van in a public street. This was a breach of an act of Parliament which imposed a penalty upon persons who should "clean any cart or carriage" in any thoroughfare or public place. The waste water ran down the gutter towards a grating leading to the sewer about twenty-five yards off. Extreme cold had caused the grating to become obstructed by ice; and therefore the water spread over a portion of the road and froze. Plaintiff's horse slipped on the ice and broke its leg. It was held that defendant was not responsible. The counsel and judges discussed the case as though the question concerned remoteness of the damage; but the difficulty really lay in finding a breach of a duty owed plaintiff. The act of Parliament had no legitimate bearing on the case, unless it could be interpreted as a legislative declaration of danger to the public of sequences such as that which produced the damage to plaintiff; and the Court determined that it could not be so interpreted. The gutters were made to carry off surface water; and no danger ordinarily would result from throwing upon the streets the amount of water which was put there through defendant's wrongful act. "There was no distinct evidence to show the cause of the stoppage of the street or drain, or that defendant knew it was stopped;" and therefore he "could not reasonably be expected to foresee that the water would accumulate and freeze at the spot where the accident happened." How then was "legal" negligence with respect to plaintiff's rights established?[36]

Alexander v. *Town of Newcastle.*[37]—Plaintiff, a special constable, while taking a prisoner to jail, was thrown by him into a pit

[34]See also Marino *v.* Lehmaier (1903) 173 N. Y. 530, 61 L. R. A. 811, 66 N. E. 572; Rolin *v.* Tobacco Co. (1906) 141 N. C. 300, 53 S. E. 891, 7 L. R. A. (N. S.) 335 and note.

[35](1872) L. R. 7 C. P. 253.

[36]"Much stress was laid in the argument on the fact that the defendant was guilty of a nuisance by collecting a crowd * * *. But, conceding that the defendant might have been indicted for a nuisance, it adds nothing to the civil injury complained of here. The question would still remain, whether the defendant's making his speech in the street was the probable and proximate cause of the injury. The nuisance and the civil injury are different things. It was not because the crowd obstructed the highway, and was therefore a nuisance, that the plaintiff's stones were broken; but because some of the crowd mounted the pile of stones." Agnew, J., in Fairbanks *v.* Kerr (1871) 70 Pa. St. 86, at 91. See also Renner *v.* Canfield (1886) 36 Minn. 90, 30 N. W. 435, 1 Am. St. R. 654; Smith *v.* Tripp (1880) 13 R. I. 153; Gorris *v.* Scott (1874) L. R. 9 Exch. 125.

[37](1888) 115 Ind. 51.

which defendant had "wrongfully and negligently suffered and permitted * * * to remain open and uninclosed," and was injured. It was held that defendant was not responsible. Evidently the duty of the town to use due care towards keeping the streets in safe condition was not imposed to prevent such an occurrence as this.[38]

Bosch v. *B. & M. R. Co.*[39]—Defendant wrongfully filled in part of the bed of a river adjacent to a public street and used the street and the made land for its tracks and car yard. Plaintiff's building was threatened by a fire. Because of the obstructions which defendant had made, the firemen were unable to reach the river with engines and hose. Consequently plaintiff's building was burned. The Court held that the damage was too remote from defendant's wrong. Plaintiff did not establish a private property right to reach the river over the tracks and yard of defendant. Defendant's encroachment was wrongful because it appropriated public property without authority; but that question of right or wrong was one to be settled between it and the municipality or State and in no way affected the controversy between plaintiff and defendant. Therefore plaintiff failed to establish a breach of a duty owed him.[40]

Metallic Compression Co. v. *Fitchburg.*[41]—Defendant's train negligently ran over hose through which firemen were turning water on plaintiff's burning manufacturing establishment. As a result plaintiff lost his buildings and machinery. It was held that defendant was responsible. Defendant's act was condemnable legally not only with respect to the injury done the owner of the hose, but also with respect to the immediate peril in which it placed plaintiff's property. It would be difficult to suggest a consideration in favor of defendant.

Cox v. *Burbridge.*[42]—Erle, *C. J.*, summed up the case as follows: "The facts I take to be these,—The plaintiff, a child of tender age, was lawfully upon the highway, and a horse, the property of the defendant, was straying on the highway. As between the owner of the horse and the owner of the soil of the highway or of

[38]Cf. Village of Carterville *v.* Cook (1889) 129 Ill. 152 (but see Rowell *v* Lowell (Mass. 1856) 7 Gray 100; Mars *v.* D. & H. Can. Co. (N. Y. 1889) 54 Hun. 625; McDowall *v.* Gt. West'n Ry. Co., L. R. [1903] 2 K. B. 331; Lane *v.* Atlantic Works (1872) 111 Mass. 136; Lynch *v.* Nurdin (1841) 1 Q. B. 29; Keefe *v.* Ry. Co. (1875) 21 Minn. 207; Walsh *v.* R. Co. (1895) 145 N. Y. 301; Frost *v.* R. (1886) 64 N. H. 220; Mangan *v.* Atterton (1866) L. R. 1 Exch. 239.

[39](1876) 44 Ia. 402.

[40]Cf. Gilson *v.* D. & H. Canal Co. (1892) 65 Vt. 213, 36 Am. St. R. 802.

[41](1872) 109 Mass. 277, 12 Am. R. 689.

[42](1863) 13 C. B. (N. S.) 430, 32 L. J. (C. P.) 89.

the herbage growing thereon, we may assume that the horse was trespassing: and, if the horse had done any damage to the soil, the owner of the soil might have had a right of action against his owner. So, it may be assumed, that, if the place in question were a public highway, the owner of the horse might have been liable to be proceeded against under the Highway Act. But, in considering the claim of the plaintiff against the defendant for the injury sustained from the kick, the question whether the horse was a trespasser as against the owner of the soil, or whether his owner was amenable under the Highway Act, has nothing to do with the case of the plaintiff. * * * He may have been there without any negligence of the owner; he might have been put there by a stranger, or might have escaped from some enclosed place without the owner's knowledge. To entitle the plaintiff to recover, there must be some affirmative proof of negligence in the defendant in respect to a duty owing to the plaintiff. But, even if there was any negligence on the part of the owner of the horse, I do not see how that is at all connected with the damage of which the plaintiff complains. It appears that the horse was on the highway, and that, without anything to account for it, he struck out and injured the plaintiff. I take the well-known distinction to apply here, that the owner of an animal is answerable for any damage done by it, provided it be of such a nature as is likely to arise from such an animal, and the owner knows it. * * * But, if the horse does something which is quite contrary to his ordinary nature, something which his owner has no reason to expect he will do, he has the same sort of protection that the owner of a dog has; and everybody knows that it is not at all the ordinary habit of a horse to kick a child on a highway." [43]

Eckert v. *Long Island R. Co.*[44]—Plaintiff's intestate died as a result of injuries received while voluntarily rescuing a child of three or four years from danger of being run down by a train which was so negligently managed by defendant as to cause the danger. It was held that defendant was responsible. Plaintiff's intestate voluntarily exposed himself to danger, but his act was morally commendable. It seems just that defendant's conduct should have been condemnable legally, not only because of the perils that might directly result, but also because someone might be harmed through a sequence such as that which injured plaintiff's intestate.[45]

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[43]Cf. Fallon *v.* O'Brien (1880) 12 R. I. 518; Reynolds *v.* Hussey (1886) 64 N. H. 64; Decker *v.* Gammon (1857) 44 Me. 322; Ellis *v.* Loftus Iron Co. (1874) L. R. 10 C. P. 10.

[44](1871) 43 N. Y. 502.

[45]Gibney *v.* State (1893) 137 N. Y. 1; Corbin *v.* Philadelphia (1900) 195 Pa. St. 461, 49 L. R. A. 715. But see Anderson *v.* R. W. Co. (1874) 25 U. C. C. P. 301. See authorities collected in notes in 36 Am. St. R. 849 (bottom)—850, and 49 L. R. A. 715.

Anthony v. *Slaid and Wife.*[46]—Defendant's wife assaulted one of the paupers whom plaintiff had contracted with a town to support in health and sickness, and thereby put plaintiff to increased expense. It was held that plaintiff had no cause of action against defendant. In suits for an injury to the person, an ordinary item of damage is consequential unavoidable increase in the expense of the person injured. In *Anthony* v. *Slaid,* we face the difficulty that a third person is the one out of pocket for this item; but if we free our mental vision from the haze of technicality, we shall be puzzled to find a reason why defendant should not have been responsible for it to *someone.* The danger of necessity for such an increase in expenditure as a consequence of the assault was patent; and certainly no sound objection can be based on the fact that defendant could not apprehend what particular person would suffer the loss. However, under circumstances like those of this case, it may be good judicial policy to avoid multiplicity of suits against defendant, and the consideration of relations, transactions, and rights of parties not before the Court, by allowing recovery from the wrongdoer of such an item of loss to only the person injured, except when a parent, husband, or master incurs the expense, and leaving the question who ultimately is to have the compensation, to be settled between the person injured, the person actually out of pocket, and anyone else who may be interested—for instance, in *Anthony* v. *Slaid,* the town, the pauper, and plaintiff.[47]

Hughes v. *McDonough.*[48]—Defendant, intending to injure plaintiff in his trade of horseshoer, meddled with a shoe which plaintiff had placed on a mare of one of his customers so as to make it appear that plaintiff had done his work carelessly and unskilfully. As a result plaintiff lost the customer. It was held

[46](Mass. 1846) 11 Met. 290.

[47]Is the law of Anthony *v.* Slaid just except upon this hypothesis? To advance as a reason for the decision that no duty owed plaintiff was infringed, obviously is to beg the question. Whether the Court would have permitted the pauper to recover the item of loss in question is doubtful, for there was the objection that he had not suffered it. Cf., however, Brosnan *v.* Sweetser (1891) 127 Ind. 1; Klein *v.* Thompson (1869) 19 Oh. St. 569; Varnham *v.* Council Bluffs (1879) 52 Ia. 698, 3 N. W. 792; Elmer *v.* Fessenden (1891) 154 Mass. 427; Penn. Co. *v.* Marion (1885) 104 Ind. 239; Ohio & Miss. R. W. Co. *v.* Dickerson (1877) 59 Ind. 317; Yates *v.* Whyte (1838) 4 Bing. (N. C.) 272; Harding *v.* Townshend (1871) 43 Vt. 536; Carpenter *v.* Eastern Transp. Co. (1878) 71 N. Y. 574; Hayward *v.* Cain (1870) 105 Mass. 213; Perrott *v.* Shearer (1868) 17 Mich. 48; Hall & Long *v.* R. Co.'s (U. S. 1871) 13 Wall. 367; Mobile etc. Ry. Co. *v.* Jurey et al. (1883) 111 U. S. 584. But see Drinkwater *v.* Dinsmore (1880) 80 N. Y. 390, and cf. Peppercorn *v.* Black R. Falls (Wis. 1894) 61 N. W. 79.

[48](1881) 43 N. J. L. 459, 39 Am. R. 603.

that defendant was responsible. Defendant's act was a wrong to the owner of the horse. It was also a wrong to plaintiff because it was done to injure his business, naturally would have that effect, and was unjustifiable.[49]

Parry v. *Smith*.[50]—Defendant, a gas-fitter, having been employed by plaintiff's master to repair a meter upon his premises, for the purpose of doing so took away the meter and made a temporary connection by means of a flexible tube between the inlet pipe and the pipe communicating with the house. Plaintiff, in performance of his duty to turn on and light the gas, went with a light into the cellar. The gas which had escaped because of the insufficiency of the connecting tube, exploded, and plaintiff was injured. The jury found that the work of defendant had been negligently done and that the injury to plaintiff resulted entirely from that negligence. It was held that defendant was responsible. Defendant's conduct was wrongful towards plaintiff's master, and it was also inchoately wrongful because it threatened such a sequence as injured plaintiff.[51]

Conclusions.

I think that from all the cases within the scope of our inquiry we may safely draw the following conclusions. Conduct may be wrongful in more than one aspect and as regards the rights of more than one person. In a determination of responsibility for consequences to plaintiff, the abstract fact that the causal act or omission of defendant was a "legal" wrong to a third person is never of any weight; but that it was wrongful to a certain person *in a particular aspect* may be of very great importance. For instance, it was so in *Eckert* v. *Long Island R. Co.*[44] Furthermore, if there has been legislation imposing duties for the benefit of the public or of a class of persons, it may be found that an effect is to make the act or omission of which complaint is made, "legally" negligent with respect to the consequences which constitute plaintiff's damage, though it might not have been adjudged so in the absence of the

[49]See also and compare:—St. Johnsbury etc. R. Co. *v.* Hunt (1882) 55 Vt. 570, 45 Am. R. 639; Tarleton *v.* M'Gauley (Eng. 1804) 1 Peake 205; Garret *v.* Taylor (1620) Cro. Jac. 567; Rice *v.* Manley (1876) 66 N. Y. 82; Delz *v.* Winfree (1891) 80 Tex. 400; Temperton *v.* Russell et al., L. R. [1893] 1 Q. B. 715; Plant et al. *v.* Woods et al. (1900) 176 Mass. 492; Randall *v.* Hazelton (Mass. 1866) 12 Allen 412; Hutchins *v.* Hutchins (N. Y. 1845) 7 Hill 104.

[50](1879) L. R. 4 C. P. D. 325.

[51]Cf. Winterbottom *v.* Wright (1842) 10 M. & W. 109.

legislation.[52] In all cases within either branch of our problem, is involved this common question: Were the chances of occurrence of the consequences which constituted plaintiff's harm within any of the dangers that provoked legal condemnation of defendant's conduct?[53] If they were, he is "legally blamable" for the harm; if they were not, he is not responsible for it. Isn't this the substance of all the universal generalizing the subject permits? The various "rules" which I discussed in connection with the first branch of our problem are often stated in the opinions of cases falling in the second branch, but they are no more efficacious or accurate for these cases than for the others.

If I am right in my conclusions, generalizing in the field of "legal cause" should be confined to a few useful, broad but not definitive considerations and a multitude of specific rules and principles of narrow compass. The nature of the problem is the further delimitation of concrete duties. Therefore the most useful results will be obtained by scientifically grouping duties into narrow classes and developing accurate and helpful rules for each class. At any rate, let us not procrusteanize the law of "legal cause" upon a bed of unprincipled generalities, nor imagine that repeating the problem in obscure language tends towards a solution.

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[52]See in addition to the foregoing cases:—Wakefield *v.* Connecticut etc. R. Co. (1864) 37 Vt. 330, 86 Am. Dec. 711; Platt *v.* Southern Photo Co. (Ga. 1908) 60 S. E. 1068; Sherm. and Redf. on Negl. § 13. But see Smith *v.* Tripp (1880) 13 R. I. 153.

[53]The sentence to which this note is appended does not mean that the inquiry involved necessarily concerns only the "probability" of occurrence of the harm in question. As I have indicated elsewhere in the article, other considerations than that of "probability" of harm may be of great importance in determining the wrongful aspects of an act or omission.

SUPPLEMENTARY NOTE.

WHAT IS "LEGAL NEGLIGENCE?"[1]

When we say, "A was negligent," we mean that A carelessly failed to do as he should have done to avoid a certain undesirable result. That is, we weigh his conduct in the scales of our judgment with the weights of

[1]See p. 26, *supra*, note 7.